IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 18TH JULY 2007 / 27TH ASHADHA 1929

SA.No. 510 of 1994(B)

(AGAINST JUDGMENT AND DECREE OF THE SUBORDINATE JUDGES COURT, MANJERI IN AS.13/1989 DATED 17/08/1993 AND AGAINST THE DECREE AND JUDGMENT IN O.S.NO.343/84 OF THE MUNSIFF COURT, MANJERI DTD. 17/10/1988)

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APPELLANT: APPELLANT:PLAINTIFF:

K.ALEVI,
SON OF KUNHAHAMMED,
AGED 33 YEARS, KARUVAMBRAM AMSOM DESOM,
ERANAD TALUK, REPRESENTED BY POWER OF ATTORNEY HOLDER V.T.ABDUL GAFFOOR.

BY ADV. SRI.O.V.MANIPRASAD

RESPONDENT:RESPONDENT:DEFENDANT:

ULLATTIL THEKKEKUNDI ABDUL AZEEZ,
SON OF ABDULLAKUTTY MOLLA,
AGED 40 YEARS, KARUVAMBRAM AMSOM DESOM,
ERANAD TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI. M.KRISHNAKUMAR
SMT.PRABHA R.MENON

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/07/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 510 OF 1994

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Dated this the 18th day of July, 2007

JUDGMENT

Plaintiff in O.S.343/1984 on the file of Munsiff Court, Manjeri is the appellant. Defendant is the respondent. Appellant originally instituted the suit for permanent prohibitory injunction which was subsequently converted into a suit for recovery of possession on the strength of title. The trial court dismissed the suit holding that appellant did not establish his title. Appellant challenged the decree and judgment before Sub Court, Manjeri in A.S.13/1989. First appellate court on reappreciation of evidence found that appellant is claiming title under Ext.A4 assignment deed executed by Kunhahammed Haji and defendant is also claiming right under Ext.B1 from the same Kunhahammed Haji and therefore appellant has title to the property. But learned Sub Judge upheld the claim of respondent under Ext.B1 holding that he

is entitled to the protection provided under section 53A of Transfer of Property Act. Hence first appeal was dismissed. It is challenged in the second appeal.

2. The second appeal was admitted on formulating the following substantial questions of law.

1) Whether in the facts and circumstances of the case, court's below are right in holding that Ext.A1 sale deed is a symblic sale deed and not acted upon?

2) Whether in the facts and circumstances of the case, court below are correct in holding that the defendant is entitled to get the benefit of Section 53A of the transfer of properties Act?

4) Whether the defendant is justified in using Ext.B1 agreement as a sheild to defend his possession.

5)Whether the defendant is estopped from

claiming the property on the strength Ext.B1 document, since he has already stated in other legal proceedings that he obtained the property from the Devasom on direct lease?

3. Learned counsel appearing for appellant and respondent were heard.

4. The argument of learned counsel appearing for appellant is that respondent is also claiming right under Kunhahammed Haji and in such circumstance title of the appellant derived from Kunhahammed Haji under Ext.A4 cannot be disputed and therefore appellant has title to the plaint schedule property. It was argued that courts below in such circumstance should have granted a decree and should not have granted protection to the respondent under section 53A of Transfer of Property Act. Learned counsel appearing for respondent pointed out that though title of Kunhahammed Haji was admitted by the respondent,

there is no admission that plaint schedule property is the property covered under Ext.A1 and A4 and unless it is established that plaint schedule property is the property obtained under Ext.A4, appellant is not entitled to get a decree for recovery of possession.

5. On hearing learned counsel appearing for appellant and respondent, it is clear that appellant did not establish his title to the plaint schedule property on the property covered under Ext.A2 is not the plaint schedule property. Unless it is established that plaint schedule property is the property covered under Ext.A1, appellant cannot establish the title. Though it was argued that respondent has not specifically disputed the identity and the contention in the written statement establish that Ext.A4 is in respect of the plaint schedule property, a reading of written statement does not support the argument. What was

contended by the respondent in his written statement was only that appellant had obtained Ext.A4 sale deed to prevent the respondent from asserting his right under Ext.B1 agreement. There is no admission in the written statement that the boundaries shown in Ext.A4 are the boundaries of the plaint schedule property or that Ext.A4 is in respect of the plaint schedule property. At best it could be said that respondent admitted that Ext.A4 sale deed was created for the purpose of claiming right over the plaint schedule property. It cannot be said that by that pleading, respondent had admitted the identity of the plaint schedule property.

6. True, respondent has admitted the title of Kunhahammed Haji to the plaint schedule property. Kunhahammed Haji obtained right over 9.91 acres under Ext.A1 assignment deed dated 21.5.1937. Ext.A4 shows that the properties covered thereunder

were originally obtained under two registered document Nos.329/1923 and document No. 31/1903 of Manjeri S.R.O. Both these properties were divided along with the other properties, as per registered partition deed 972/1937 The properties assigned under Ext.A1 are the properties allotted to the share of the assignor under Ext.A1 in that partition. Under Ext.A1, Kunhahammed Haji purchased the two items of properties which were originally obtained under registered documents 329/1923 and 31/1903. Out of the two items of properties only a small portion of one of the two items of properties was assigned under Ext.A4 by Kunhahammed Haji. Ext.A4 prove that the property assigned therein is having only an extent of 14 1/6 cents (o.0561 hector) which is a portion of 1.75 acres having measurements of 10 x 17 and 18.288x31.09 metres by name Pullur Paramba. The title traced out in Ext.A4 shows that, that property was originally

obtained as per registered document 329/1923, which was subsequently divided under registered partition deed 972/1937 and thereafter obtained under Ext.A1 assignment deed dated 21.5.1937 and thereafter obtained purchase certificate from Land Tribunal as per order in SM3483/1976. When the said recitals is appreciated in the light of the recitals in Ext.A1, it is clear that the derivation of title to the property covered under Ext.A4 is not correct. Ext.A1 shows that item No.2 is pullur paramba in R.S.178/3 and that property was obtained by registered document 31/1903 and not by registered document No.329/1923, though both the properties were divided under registered partition deed of 972 of 1937. Item No.1 of Ext.A1 is the property obtained originally under document No.329/1923. Therefore if the property that was sold under Ext.A4, is the property covered under document No.329/1923, it cannot be portion of the

property of pullur paramba but could only be part of kallivalappu paramba which is item No.1 therein. Apart from the said discrepancy, Ext.A4 shows that the property sold thereunder is the property which lies to the north of the road. Ext.A4 shows that the western boundary is the property in the possession of Abdurahimankutty. The northern boundary is property in the possession of Alavi and Yousuf. The eastern boundary is shown as the remaining property of Kunhahammed Haji. As per the plaint as amended, plaint schedule property is the property which lies to the east of the road and to the south of the property from Abdurahimankutty and to the north of the remaining property of Kunhahammed Haji and to the west of the property in the possession of Alavi and Yousuf. Evidently the plaint was amended in view of Ext.C1 report and C2 plan submitted by the Commissioner whereunder the plaint schedule property was

identified as plot A B C D which lies to the south of the road. The argument of learned counsel appearing for appellant is that boundaries shown in Ext.A4 was a mistake and the correct boundaries are found out by the Commissioner as demarcated in Ext.C2 plan and therefore appellant has title to the plaint schedule property. As rightly pointed out by learned counsel appearing for respondent, appellant has no case in the plaint that in Ext.A4 assignment deed, any mistake was crept on describing the boundaries and the property actually purchased under Ext.A4 is not the property which lies to the north of the road but to the east of the road. Appellant has also not adduced any evidence including that of the assignor under Ext.A4 to show that a mistake was crept in Ext.A4.

7. When the suit is for recovery of possession on the strength of tile, appellant can only claim

title to that property covered under Ext.A4. The property covered under Ext.A4 is the property which lies to the north of the road. If that be so, appellant is not entitled to get a decree for recovery possession of the plaint schedule property, which lies to the east of the road. Learned counsel appearing for appellant then argued that as the other boundaries tallies as per Ext.C1 report, the appellant is entitled to get a decree for recovery of possession holding that the property covered under Ext.A4 is the plaint schedule property. I cannot agree with the submission. Even the other boundaries do not tally unless the boundaries are shifted. There is no evidence to prove that out of 9 and odd acres obtained by Kunhahammed Haji, there is no other property which could tally with the boundaries shown in Ext.A4 and therefore the plot ABCD marked in Ext.C2 is the only property that could be

transferred thereunder. In the absence of any such case and evidence to prove that fact appellant is not entitled to a decree for recovery of possession of the plaint schedule property, on the strength of Ext.A1. As appellant did not establish his title, there is no necessity to consider the claim under under section 53A of Transfer of Property Act.

The appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A..NO.510 /1994

JUDGMENT

18TH JULY,2007